UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 229

Docket No. PH-0752-09-0574-I-1

Gerald R. Boutin,

Appellant,

v.

United States Postal Service,

Agency.

November 23, 2010

Gerald R. Boutin, Providence, Rhode Island, pro se.

Wendy I. Provoda, Esquire, Windsor, Connecticut, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his restoration to duty appeal and alleged constructive suspension claim for lack of Board jurisdiction. For the reasons set forth below, we DENY the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115(d). We REOPEN the case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision AS MODIFIED, still dismissing the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant is a preference eligible Mail Handler at the Providence, Rhode Island, Processing and Distribution Center (P&DC). Initial Appeal File (IAF), Tab 4 at 74; Tab 17, Subtab 7. The Providence P&DC is located in the Southeast New England District. *Id.*, Tab 4 at 21. The appellant incurred a compensable injury in June 1984, resulting in thoracic/lumbar somatic dysfunction, and he reached maximum medical improvement in February 1994. *Id.* at 30, 54, 120-23. Among other restrictions, the appellant was unable to lift more than 10 pounds. *Id.* at 119; Tab 17, Subtab 11. Starting in March 2007, the appellant worked as a Mail Handler with modified duties, i.e., facing and traying letters, hand cancelling letters and flats, verifying postage, and performing other duties within his physical restrictions. *Id.*, Tab 4 at 121.

¶3 In a June 10, 2009 letter, the agency informed the appellant that, pursuant to the National Reassessment Process (NRP), it had searched for work within his medical restrictions on his tour and at his facility but no operationally necessary work was available. IAF, Tab 4 at 39; Tab 17, Subtab 4, Exh. A. In a meeting, also on June 10, 2009, agency officials told the appellant that a search had been conducted in the local commuting area, i.e., within a 50-mile radius, but no work was found for him. *Id.*, Tab 4 at 26-27, 56. The agency directed the appellant to leave work and not to report back unless contacted. *Id.* at 39; Tab 17, Subtab 4, Exh. A.

¶4 The appellant submitted a new set of medical restrictions on or about July 20, 2009, which permitted him to lift up to 15 pounds. IAF, Tab 4 at 23, 28, 54; Tab 17, Subtab 12. The agency then located an assignment for him, working 4 hours per day at the Providence P&DC, traying DVDs and non-machineable letters. *Id.*, Tab 4 at 23, 28-29, 31; Tab 17, Subtab 6. The appellant began working in the part-time assignment on August 13, 2009. *Id.*, Tab 4 at 23; Tab 17, Subtab 6 at 3. The appellant was on leave without pay (LWOP) from June 10 through June 25, 2009, when his pay status was then converted to administrative

leave. IAF, Tab 4 at 27; Tab 17, Subtab 4, Exhs. B, C. The agency later also converted the appellant's period of LWOP during June 10-25, 2009, to administrative leave. *Id.*, Tab 4 at 32-34.

¶5 The appellant filed an appeal of the agency's actions in putting him off work and later placing him in a part-time assignment. IAF, Tabs 1, 7. He argued that the agency placed him on enforced leave, he was denied restoration to duty, he was performing operationally necessary work in his modified Mail Handler assignment, and he was subjected to disability discrimination in that he was denied reasonable accommodation. *Id.*, Tabs 11, 17.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, without a hearing. *Id.*, Tab 19. The administrative judge found that the appellant did not establish that he was constructively suspended because his absence was not involuntary, i.e., that he could have returned to work in his regular duties outside his medical restrictions. *Id.* at 8. The administrative judge further found that the appellant did not establish jurisdiction over his restoration appeal. *Id.* at 11-12. He held that the appellant did not make a nonfrivolous allegation that the agency acted in an arbitrary and capricious manner when it terminated his modified duty assignment and that he was subsequently provided a part-time assignment. *Id.* The administrative judge also concluded that because the Board lacks jurisdiction over the appeal, it may not decide the appellant's pendent claim of disability discrimination. IAF, Tab 19 at 8, 12.

¶7 The appellant has filed a petition for review of the initial decision, asserting for the first time that the agency for many years erroneously concluded he had a 10-pound, rather than a 15-pound, lifting restriction. Petition for Review File (PFR File), Tab 1 at 2-4. The appellant reiterates his arguments on appeal that the agency constructively suspended him because it barred him from duty for more than 14 days. *Id.* at 4-6. He asserts that his medical restrictions were permanent and prevented him from returning to full duty. *Id.* at 6. He also

reiterates that the agency's action in removing him from his modified duties was arbitrary and capricious because he was performing operationally necessary work. *Id.* at 7-12. Further, he asserts that the administrative judge erred in not deciding his disability discrimination claim, in denying his request for a postponement after his counsel withdrew, and in giving him 7 days to respond to the Order to Show Cause on jurisdiction. *Id.* at 13-14. The agency has responded in opposition to the appellant's petition for review. PFR File, Tab 3.

ANALYSIS

¶8 The Board will grant a petition for review only when significant new evidence is presented or the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, 108 M.S.P.R. 384, ¶ 16 (2008); 5 C.F.R. § 1201.115(d). The appellant has not met this standard. His argument regarding an error with regard to his lifting restriction is raised for the first time in his petition for review. The Board will not consider such an argument absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Also, the appellant has not shown that the administrative judge abused his discretion in denying his request for a postponement and giving him 7 days to respond to the Order to Show Cause. An administrative judge has wide discretion in the conduct of the proceedings. *Tisdell v. Department of the Air Force*, 94 M.S.P.R. 44, ¶ 13 (2003); 5 C.F.R. § 1201.41. Further, the appellant has not shown that any procedural error by the administrative judge prejudiced his substantive rights and would warrant granting his petition. *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981). The appellant's arguments that his modified duties were operationally necessary is a repetition of the arguments that he made below and that the administrative judge found unpersuasive. This also does not warrant full review of the record by the Board. *Hunt v. U.S. Postal Service*, 114 M.S.P.R. 379, ¶ 11 (2010). The

administrative judge was also correct in finding that, in the absence of jurisdiction over the appeal as a constructive suspension or restoration appeal, the Board may not address the appellant's claim of disability discrimination. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982). For these reasons, we deny the appellant's petition for review. We reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, to address more fully the restoration to duty appeal and constructive suspension claim.

Denial of Restoration

¶9 The Federal Employees' Compensation Act and the Office of Personnel Management's implementing regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002), *abrogated on other grounds by Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). The nature of an employee's restoration rights depends on the extent and timing of recovery from a compensable injury. 5 U.S.C. § 8151; *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 15 (2006); 5 C.F.R. § 353.301 (setting forth restoration rights for those who are fully recovered within or after 1 year, who are physically disqualified, or who are partially recovered).

¶10 A partially recovered employee is one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. 5 C.F.R. § 353.102. A physically disqualified employee is someone who for medical reasons is unable to perform the duties of his former position and whose condition is considered permanent with little likelihood for improvement or recovery. 5 C.F.R. § 353.102. After 1 year, a physically disqualified employee's

restoration rights are equivalent to those of someone who is partially recovered, as applicable. 5 C.F.R. § 353.301(c). The administrative judge correctly analyzed the rights of the appellant here, who reached maximum medical improvement in 1994, as a partially recovered employee.

¶11 In the case of a partially recovered employee, an agency must make every effort to restore the individual to a position within his medical restrictions and within the local commuting area. *Delalat*, 103 M.S.P.R. 448, ¶ 17; 5 C.F.R. §§ 353.102, 353.301(d). To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must make a nonfrivolous allegation that: (1) He was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of him; (3) the agency denied his request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

¶12 In this case, it is undisputed that the appellant satisfies the first two jurisdictional criteria. Further, the agency's elimination of the appellant's limited duty assignment satisfies the third criterion. Discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353. *See Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 11 (2010) (citing *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007)).

¶13 The administrative judge did not specifically address whether the agency's later provision of an assignment working 4 hours per day constituted a denial of restoration. The Board, however, has recently held that a provision of part-time work, i.e., where an agency has partially eliminated previously afforded limited duty pursuant to the NRP, constitutes a nonfrivolous allegation of denial of restoration. *Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶ 14 (2010). The Board concluded that this is not a challenge to the details or circumstances of a

restoration but is instead a rescission of a previously provided restoration. *Id.* Therefore, we find that the appellant has satisfied the third jurisdictional criterion with regard to the agency's provision of part-time work under the NRP, as well as its initial discontinuation of his prior limited duty assignment.

¶14 We find, however, that the appellant has failed to make a nonfrivolous allegation that the agency acted in an arbitrary and capricious way. As stated above, the appellant's repetition of his assertions that his limited duty work was operationally necessary is insufficient to warrant reopening the appeal. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980). Moreover, an agency has authority to determine if tasks are operationally necessary. *Chen v. U.S. Postal Service*, 114 M.S.P.R. 292, ¶ 10 (2010). It is axiomatic that an agency must determine what work is necessary and available to accomplish its mission. *Id.*

¶15 In *Sanchez*, the Board held that an appellant satisfies the final jurisdictional requirement, i.e., to show that the agency's action was arbitrary and capricious, where it did not examine the entire commuting area in determining the available work under the NRP, as required under 5 C.F.R. § 353.301(d). 114 M.S.P.R. 345, ¶¶ 12-14. The scope of a commuting area "is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work." *Sanchez*, 114 M.S.P.R. 345, ¶ 13. The starting point in determining the local commuting area is the location of the employee's former duty station, not his residence. *Dean v. U.S. Postal Service*, 115 M.S.P.R. 56, ¶ 15 (2010).

¶16 Here, the agency defined the local commuting area as the 50-mile radius surrounding the employee's duty station. IAF, Tab 4 at 26, 124. The search for operationally necessary work within the appellant's restrictions at the time he was placed off work on June 10, 2009, encompassed some 500 facilities within that radius. *Id.* at 26. In addition to facilities within the Southeast New England District, the search encompassed others in the Northeast Area, including

Connecticut and Boston districts. *Id*. at 26, 119. The appellant has not asserted or proffered any evidence that the agency's search did not encompass the local commuting area. The agency's submissions may not be dispositive at the jurisdictional stage as to whether it properly defined the local commuting area in this case; however, the appellant has failed to make a nonfrivolous allegation that it was not properly defined. *Cf. Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶¶ 4-7 1999) (appellant challenged the scope of the local commuting area). There is no assertion or evidence from either party as to the scope of the search undertaken when the appellant was placed in a 4-hour per day assignment on August 13, 2009. Again, however, the appellant has failed to assert that the agency's search was inadequate.

¶17 Because the appellant failed to make a nonfrivolous allegation that the agency's denial of restoration was arbitrary and capricious under the requirements of 5 C.F.R. § 353.304(d), the Board lacks jurisdiction over the appellant's restoration appeal.

Constructive Suspension

¶18 The appellant also asserts that his absence on June 10-25, 2009, was a constructive suspension. Appealable constructive suspension claims may arise in two situations: when an agency places an employee on enforced leave pending an inquiry into his ability to perform or when an employee who is absent from work for medical reasons asks to return to work with altered duties and the agency denies the request. *Rutherford v. U.S. Postal Service*, 112 M.S.P.R. 570, ¶ 9 (2009). If an employee absent due to medical restrictions requests work within those restrictions and the agency is bound by policy, regulation or contract to offer available modified work, the employee's continued absence due to the agency's failure to provide such available work constitutes a constructive suspension. *Id*. The dispositive issue in determining whether a constructive suspension occurred is who initiated the absence. The appellant has the burden of showing his absence was involuntary. *Id*. In this appeal, the administrative judge

determined that the appellant's absence was not involuntary, holding that he could have returned to work in regular Mail Handler duties outside his medical restrictions. IAF, Tab 19 at 8. However, the record shows that the appellant had reached maximum medical improvement following his compensable back injury. *Id.*, Tab 4 at 123. At all times relevant herein, the appellant has sought work only within his medical restrictions. The Board has held that if an individual claims that he can only perform modified duties and the agency has no such work available, then the appellant's absence is not considered involuntary. *Rutherford*, 112 M.S.P.R. 570, ¶ 9. Thus, the appellant's absence here may not have been involuntary, but for a different reason than relied on by the administrative judge.

¶19 We find, however, that the circumstances at issue in this appeal do not give rise to a constructive suspension claim. Instead, we find that the appellant's rights and remedies for the period he was off work during June 10-25, 2009, are subsumed in the restoration appeals process. *See Kinglee*, 114 M.S.P.R. 473, ¶ 19. That is, the appellant's absence, even if deemed to be agency-initiated, stemmed from the agency's determination that it lacked operationally necessary tasks within the appellant's medical restrictions. IAF, Tab 4 at 26-27, 39, 56. Whether the agency acted properly in making this determination implicates the substance of the appellant's restoration appeal. *See Kinglee*, 114 M.S.P.R. 473, ¶ 20. If an appellant establishes jurisdiction over this claim, he has the opportunity to prove on the merits that he was denied restoration, to obtain appropriate relief (restoration to duty and back pay), and to adjudicate his pendent disability discrimination claim, for which he might receive compensatory damages as well. That is, he could receive full relief. If an appellant, however, fails to prove his restoration claim, i.e., if the agency afforded the appellant the restoration rights to which he was entitled, it would then be illogical to hold that a proper restoration constituted a constructive suspension. *Id.*, ¶ 21. In this case, as discussed above, the appellant failed even to establish jurisdiction over his restoration claim by making a nonfrivolous allegation that its elimination of his

limited duty assignment was arbitrary and capricious. The appellant did not make a nonfrivolous allegation that operationally necessary work was available within his restrictions or that the agency failed to meet its regulatory obligation to attempt to restore him to duty in the local commuting area.

¶20 The Board has held that viewing an appellant's constructive suspension claim as subsumed by the restoration claim "is consistent with the principle of excluding other avenues of relief where a comprehensive scheme exists regarding the rights and remedies at issue." *Kinglee*, 114 M.S.P.R. 473, ¶ 22 (citing *United States v. Fausto*, 484 U.S. 439 (1988)). Here, the Office of Personnel Management has promulgated a comprehensive scheme that identifies the rights and remedies for individuals who partially or fully recover from compensable injuries. *Id*.; 5 C.F.R. part 353. "These procedures are sufficient to redress all of the appellant's claims with respect to the NRP." *Kinglee*, 114 M.S.P.R. 473, ¶ 22.

ORDER

¶21 Accordingly, we find that the Board lacks jurisdiction over this appeal. We affirm as modified the administrative judge's initial decision and dismiss the appeal. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.